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Supreme Court, U.S.
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NO. 95-544

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ARLENE KURTZ,

Petitioner,

vs.

CITY OF NORTH MIAMI, FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

PETITION FOR WRIT OF CERTIORARI

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61 pp

QUESTION PRESENTED FOR REVIEW

Whether the City of North Miami's regulation requiring that any applicant for any City job execute, as a condition of applying for employment, an affidavit stating that he or she has not smoked or used tobacco products for the preceding twelve months violates the Due Process Clause of the Constitution of the United States, where the regulation is conceded by the City to be unrelated to job functions or performance and where the City's only asserted justification for the regulation is the reduction of costs resulting from smoking-related illnesses.

PARTIES TO THE PROCEEDING

All parties are named in the caption of the case.

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PETITION FOR A WRIT OF CERTIORARI

Arlene Kurtz petitions for a writ of certiorari to review the decision of the Supreme Court of Florida in this case.

OPINIONS BELOW

The opinion of the Dade County, Florida Circuit Court (App. A-24) is unreported. The opinion of the Florida Third District Court of Appeal is reported at 625 So.2d 899 (Fla. Dist. Ct. App. 1993). The opinion of the Florida Supreme Court (App. A-35) is reported at 653 So.2d 1025 (Fla. 1995). The Florida Supreme Court's order denying Arlene Kurtz's motion for rehearing (App. A-42) is unreported.

JURISDICTION

The Florida Supreme Court entered judgment in this case on April 20, 1995. (App. A-35). It denied a timely motion for rehearing on July 5, 1995. (App. A-42). This Court has jurisdiction pursuant to title 28 United States Code section 1254(1).

CONSTITUTIONAL PROVISION, STATUTE AND REGULATION INVOLVED IN THIS CASE

This case involves the validity of Administrative Regulation 1-46 of the City of North Miami, Florida. (App. A-1). The case arises under the Due Process Clause of the Constitution of the United States, amendment 14, (App. A-3), and title 42 United States Code section 1983. (App. A-3).

STATEMENT OF THE CASE

This case arises from a Florida state court suit by petitioner Arlene Kurtz against the City of North Miami, Florida for injunctive and declaratory relief to prevent the enforcement of Administrative Regulation 1-46, which requires that any applicant for any job with the City of North Miami execute an affidavit stating that the applicant has

not used tobacco products for the preceding twelve months. (App. A-1, A-4).

The trial court, on cross-motions for summary judgment, upheld the validity of Administrative Regulation 1-46 against Kurtz's challenge under the Due Process and Equal Protection guarantees of the United States and Florida constitutions and under the Florida constitutional right of privacy. (App. A-24). The Florida Third District Court of Appeal reversed, holding that the regulation violated the explicit privacy guarantee of article I, section 23 of the Florida Constitution. *Kurtz v. City of North Miami*, 625 So.2d 899 (Fla. Dist. Ct. App. 1993). The Supreme Court of Florida quashed the district court's decision, holding that the regulation did not violate the Florida constitutional privacy provision. *City of North Miami v. Kurtz*, 653 So.2d 1025, 1027-28 (Fla. 1995) (App. A-37 to A-39). The Florida Supreme Court then went on to expressly hold that Administrative Regulation 1-46 in no way implicated any privacy or liberty interest implicit in the United States Constitution, and was therefore valid under federal as well as state constitutional law. *Id.* at 1028-29 (App. A-39).

On September 29, 1988, petitioner Arlene Kurtz submitted an employment application to the City of North Miami, Florida. In December 1989, the Kurtz took and passed a written examination required for all prospective applicants for employment by the City of North Miami. (App. A-36).

On March 9, 1990, the City adopted Administrative Regulation 1-46, which requires that "[a]ll applicants must be a nonuser (sic) of tobacco or tobacco products for at least one year immediately preceding application, as evidence (sic) by the sworn affidavit of the application (sic)." (App. A-1).

In May 1990, the City notified Kurtz that there was an opening for a clerk-typist, and made an appointment to interview her for that position. When Kurtz arrived for the interview on May 31, 1990, she was informed by the interviewer that in order to be hired for any job with the City, she would have to sign an affidavit stating that she did not smoke or use tobacco products and that she had not done so within the past twelve months. Kurtz told the interviewer that she could not truthfully sign such an affidavit, and the interview was terminated. (App. A-36).

Because she submitted her application for employment prior to the adoption of Administrative Regulation 1-46, Kurtz was not informed of the regulation until the interview stage. A person seeking to apply for a job after the regulation was adopted would not even be permitted to submit an application unless he or she first signed the affidavit required by the regulation.

Since that terminated interview, Kurtz has not been notified of any other job openings with the City of North Miami. (App. A-10 to A-12). As a smoker, Kurtz is disqualified from reapplying for any job with the City so long as Administrative Regulation 1-46 remains in effect.

Kurtz was in May 1990 and is now qualified for the job of clerk-typist. (App. A-10 to A-12). Kurtz would be willing to abide by a reasonable restriction on smoking while on duty or where smoking would affect her fellow employees or others, as a condition of employment by the City. (App. A-10 to A-12).

Kurtz, who is 52 years old, has smoked for 30 years, and has been unsuccessful in trying to quit smoking. [R. III, pp. 2375-78, 2395 (depo. of Kurtz, pp. 5-8, 25)].[1]

While the City's sole asserted justification for its regulation is the reduction of costs due to smoking-related illnesses, the City does not bar its present employees from smoking or using tobacco, and persons already employed by the City prior to the adoption of the regulation were not required to execute affidavits regarding their present or past smoking or tobacco use as a condition of their continued employment by the City. The regulation only requires abstinence from tobacco use during the one-year period prior to applying for a job, and does not prevent the applicant from starting or resuming smoking or using tobacco once hired. (App. A-36).

The City's regulation against hiring smokers and persons who have used tobacco within the past twelve months applies to all job positions, regardless of whether any particular degree of physical fitness

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1 References to the record in the state court are to volume and page number, e.g., [R. ___, p. ____].

is required for the job. The regulation prohibits any person who has used any tobacco product from applying for any City job, regardless of whether that individual is otherwise qualified for the job. (App. A-10 to A-12). The effect of the regulation is thus that a less-qualified non-smoker may be hired by the City, while a more-qualified smoker would not even be allowed to apply.

City job applicants who are smokers or tobacco users are not individually screened or examined to determine their actual health conditions or medical histories. (App. A-10 to A-12). As to Kurtz, for example, City of North Miami Assistant City Manager Lee Feldman admitted on deposition that the City has no knowledge as to Kurtz's actual health condition. [R. III, p. 2491 (depo. of Feldman, p. 68)].

The City does not offer job applicants who are smokers or tobacco users the option of waiving insurance coverage. (App. A-10 to A-12). The City also does not give smokers the option of paying for any increased insurance costs that may result from their smoking. (App. A-10 to A-12). In the case of Kurtz, she testified at her deposition in this case that she already has her own private health insurance coverage. [R. III, p. 2389 (depo. of Kurtz, p. 19)].

Persons who get past the application and interview stages are given physical examinations before being hired, in order to determine whether they have any preexisting conditions that would be excluded by the City's insurance program, and to determine if they are physically capable of doing the jobs for which they are being considered. (App. A-10 to A-12). However, only tobacco users are automatically screened out at the initial application stage, and thus never given the opportunity to demonstrate whether they in fact have any preexisting health conditions related to smoking or tobacco use that may increase the City's insurance costs, or whether they are, tobacco-use notwithstanding, physically capable of performing their job functions. In effect, as to tobacco users, and only tobacco users, the City indulges an irrebuttable presumption that they are unfit for all City employment.

At no time, before or after implementing Administrative Regulation 1-46, did the City investigate actual health costs or productivity data in order to determine whether off-duty tobacco use had any real effect on the City's health insurance costs or worker productivity. [R. III, pp. 2468-69, 2487, 2500 (depo. of Feldman, pp.

45-46, 64, 78)].

After the fact, in connection with this case, the City retained an expert witness, James M. Shultz, who prepared an affidavit stating, essentially, that smoking causes various diseases and is highly addictive. The City's expert summarized the opinions of several other experts whose estimates of the cost to an employer of an employee's smoking varied from $135 per year to $4,611 per year. Shultz's own estimate was that employee smoking cost an employer $435 per year per male smoker and $349 per female smoker. That affidavit, which was not based on any actual health, productivity or insurance cost data supplied by the City, in fact revealed that from 57 to over 90 percent of the excess costs (such as lost productivity due to cigarette breaks and second-hand smoke) attributed to employee smoking would be eliminated by prohibiting smoking on the job. [R. II, pp. 458-64 (affid. of Shultz, pp. 17-22)].

While the City's sole justification for Administrative Regulation 1-46 is the regulation's anticipated cost-saving impact, there was no assertion in this case that such savings were needed to ensure the operation or fiscal soundness of City government or services.

Assistant City Manager Feldman testified that the City does have in place a voluntary smoking cessation program, but admitted that he did not know or attempt to determine the success rate of that program or whether that program has been or would be effective in achieving the some or all of the same cost savings that Administrative Regulation 1-46 was allegedly designed to realize. [R. III, pp. 2454-55 (depo. of Feldman, pp. 31-32)]. The City's own expert noted that such programs, properly implemented, can have up to a 40 percent effectiveness rate. [R. II, p. 464 (affid. of Shultz, p. 22)].

The petitioner does not dispute that there is evidence to support the conclusion that smoking and tobacco use are linked to a higher risk of certain health problems. The petitioner does not dispute that government employers may restrict, or even ban, smoking in government buildings or during work hours. She does not dispute that a government employer may, in order to reduce costs, implement a voluntary smoking cessation program or similar voluntary measures. She also does not dispute that a restriction on off-duty or even pre-hiring tobacco use may be justified for certain jobs where a particular

level of physical fitness is legitimately needed in order to perform the functions of such jobs.

What is challenged in this case is the City's requirement that all prospective applicants for all City jobs refrain from using tobacco for a year prior to applying, where that requirement is completely unrelated to job functions, performance, or qualifications.

REASONS FOR ALLOWANCE OF THE WRIT

I. The Florida Supreme Court's Decision Upholding Administrative Regulation 1-46 Conflicts with Decisions of this Court Holding that Conditions or Restrictions on Government Employment Opportunities Must Be Rationally Related to Job Functions or Performance.

Due process requires that conditions placed on an individual's right to seek government employment bear, at a minimum, some rational relationship to the functions of the job sought or to the qualifications of the job-seeker.

In *Kelley v. Johnson*, 425 U.S. 238 (1976), the Court held that the Fourteenth Amendment Due Process Clause "affords not only a procedural guarantee against the deprivation of 'liberty,' but likewise protects substantive aspects of liberty against unconstitutional restrictions by the State." *Id.* at 244.

While Kurtz, as a mere applicant for employment, has no Fourteenth Amendment "property" interest at stake in this case, she does have a substantive liberty interest in being permitted to seek government employment unconstrained by arbitrary and irrational hiring restrictions.[2] *See Keyishian v. Board of Regents*, 385 U.S. 589, 606-07

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2 In the context of a procedural due process claim, the Court has recognized that a state's refusal to hire does not alone implicate due process, but a regulation that would foreclose *all* future employment prospects "would be a different case." *Board of Regents v. Roth*, 408 U.S. 564, 573-74 (1972). In the present case, because Administrative Regulation 1-64 applies to all applicants for

(1967)[3]; *also Rutan v. Republican Party of Illinois*, 497 U.S. 62, 77 n.9 (1990); *Perry v. Sindermann*, 408 U.S. 593, 597 (1972).

In *Kelley*, the Court held that a county's regulation of hair-length for police officers, as part of its extensive regulation of the organization of the uniformed police force, was rationally related to the goals of making uniformed officers more recognizable to the public and to the desire to promote esprit de corps within the force. 425 U.S. at 246-49. The analysis of whether or not the government's asserted justification for the regulation was "sufficiently rational," *id.* at 248, thus turned on whether the regulation had some, at least arguable, bearing on the particular duties of police officers.

The Florida Supreme Court in the present case, while citing and purporting to follow *Kelley*, (App. A-39), identified no aspect of the City of North Miami's regulation that relates in any way, rationally or otherwise, to the functions of the particular clerk-typist job Kurtz was seeking, to Kurtz's qualifications for that job, or to the functions and qualifications of all of the other City jobs and job applicants covered by the regulation. Rather, the Court related the regulation solely to the City's asserted desire to decrease its costs flowing from insurance premiums and employee sick-time. (App. A-39). The reasoning used and the result reached by the Florida Supreme Court are in conflict with *Kelley* and other decisions of this Court requiring a rational relationship between a government hiring regulation and the duties and functions of the job or jobs to which the regulation applies.

The Court's reasoning and holding in *Kelley* are reflected in *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976), in which the Court upheld a mandatory retirement age for uniformed police officers on the ground that the requirement that such officers retire at age 50 was rationally related to the state's legitimate interest

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all City jobs, Kurtz is effectively barred from City employment in any capacity.

3 "[T]he theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected." *Keyishian*, 385 U.S. at 606-07.

in ensuring the physical preparedness of its uniformed force. *Id.* at 314-15; *also Vance v. Bradley*, 440 U.S. 93, 98-103 (1979).

Likewise in *Schware v. Board of Bar Examiners*, 353 U.S. 232 (1957), in overturning New Mexico's rule excluding from the practice of law any person who had formerly been a member of the Communist party, the Court held, "A State can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law." *Id.* at 239; *also Shelton v. Tucker*, 364 U.S. 479, 488 (1960); *Konigsberg v. State Bar of California*, 366 U.S. 36 (1961).

The circuit courts of appeals have consistently followed this Court's lead in determining the constitutionality of government hiring regulations on the basis of the challenged regulations' rational relationship to job functions or performance. *See, e.g., Grusendorf v. City of Oklahoma City*, 816 F.2d 539, 543 (10th Cir. 1987); *DeWeese v. Town of Palm Beach*, 812 F.2d 1365, 1367 (11th Cir. 1987) (ordinance preventing shirtless jogging by males not related to any legitimate interest of town); *DiIulio v. Board of Fire and Police Commissioners*, 682 F.2d 666, 668-70 (7th Cir.), *cert. denied*, 459 U.S. 1038 (1982) (police promotion examination rationally related to job functions and candidates' qualifications); *Hander v. San Jacinto Junior College*, 519 F.2d 273, 277 (5th Cir.), *clarified on rehearing granted*, 522 F.2d 204 (5th Cir. 1975) (college faculty grooming code prohibiting beards not rationally related to valid educational purpose); *Lansdale v. Tyler Junior College*, 470 F.2d 659 (5th Cir. 1972), *cert. denied*, 411 U.S. 986 (1973) (hair length rule for college students not rationally related to legitimate educational aims).

Like the various hiring regulations addressed by the courts in the cases cited above, a hiring concerning off-duty smoking must be rationally related to a particular government job's functions in order to comport with due process. The only reported federal decision to address such a restriction is the Tenth Circuit's decision In *Grusendorf v. City of Oklahoma City*. In *Grusendorf*, a fire department rule prohibited firefighter trainees from smoking on or off duty for one year after hiring, and required new hirees to sign an agreement to that effect as a condition of employment. 816 F.2d at 540. The court clearly recognized that the rule implicated protected liberty interests, stating:

> It can hardly be disputed that the Oklahoma City Fire Department's non-smoking regulation infringes upon the liberty and privacy of the firefighter trainees. The regulation reaches well beyond the work place and well beyond the hours for which they receive pay. It burdens them after their shift has ended, restricts them on weekends and vacations, in their automobiles and backyards and even, with the doors closed and the shades drawn, in the private sanctuary of their own homes.

Id. at 541.

While the Tenth Circuit acknowledged that the liberty and privacy interests at issue in the case of a no-smoking rule may not rise to the level of a fundamental right, the Court also emphasized that even non-fundamental rights are entitled to meaningful protection against governmental infringement. The court stated:

> Nor are we inclined to accept the defendants' contention that, since cigarette smoking has not been recognized as a fundamental right, no balancing test nor rationale of any kind whatsoever is needed to justify the restriction. This reasoning would seem to suggest that the state can, arbitrarily and for no reason, condition employment upon an agreement to refrain from a nearly limitless number of innocent, private and personal activities. We would be reluctant to go this far even if the law would tolerate such a venture.

Id. at 542.

In *Grusendorf* the court of appeals upheld the no-smoking rule, but only upon finding a "rational connection between the non-smoking regulation and the promotion of the health and safety of the firefighter trainees." The court noted that good health and physical conditioning are essential requirements for firefighters who "are frequently exposed to smoke inhalation," where "it might reasonably be feared that smoking increases this health risk." *Id.* at 543.

In contrast to the restriction on off-duty smoking upheld in

Grusendorf, the City of North Miami's concedes that its no-smoking hiring regulation has no relationship to the qualifications of the applicants or the requirements of the jobs sought. The City of North Miami's regulation violates due process because it applies to *all* applicants for *all* government jobs, for reasons unrelated to their fitness or qualifications for any particular job.

II. The Florida Supreme Court's Ruling that the City's Asserted Interest in Reducing Costs Resulting from Smoking-Related Illnesses Constitutes a "Rational Basis" for a Hiring Regulation that is Unrelated to Job Functions or Performance and that Intrudes into the Private, Lawful, Off-Duty Conduct of Job Applicants Presents an Important Question of Federal Law Which Has Not Been, but Should Be, Decided by this Court.

In *Watson v. City of Memphis*, 373 U.S. 526 (1963), the Court held, "[I]t is obvious that vindication of conceded constitutional rights cannot be made dependent upon any theory that it is less expensive to deny than to afford them." *Id.* at 537; *also Liddell v. State*, 731 F.2d 1294, 1308 (8th Cir.), *cert. denied*, 469 U.S. 816 (1984); *see Reed v. Reed*, 404 U.S. 71, 76 (1971). In this case, however, the City of North Miami quite explicitly asserts its desire to save costs as the sole justification for denying all employment opportunities to individuals who have used tobacco products within one year of applying for a City job.

This Court has never to date expressly addressed the question of whether the interest in saving costs alone can constitute a rational justification for a government hiring restriction which intrudes on a non-fundamental liberty interest, where such intrusion is not otherwise rationally related to job functions or performance.

This case thus presents one of the most important issues in employment law today--the extent to which government employers can regulate, in the name of cost-saving, the private off-duty lives of their employees and job applicants.

Whether the Florida Supreme Court intended such a result or not, its opinion in this case would legitimize governmental intrusion into and regulation of such disparate areas of private life as: body weight,

diet, finances, hobbies, and personal morality, all based solely on the government's asserted interest in saving money.[4]

The real danger presented by this case is that the Florida Supreme Court's decision will open up virtually every aspect of a person's private life to intrusive governmental regulation in the supposed interest of cost-cutting. The effect of that decision may be that, unless the off-duty, pre-hiring or otherwise private activity is one previously recognized as a fundamental right, such as reproductive, religious and family matters, then it can be regulated by the state if it bears any conceivable relationship, not to the government employer's interest in determining and maintaining job functions and performance, but to its interest in lessening, by any amount no matter how small, government costs.

Thus, using the same rationale as that approved by the Florida Supreme Court in this case, a government employer could regulate when its employees or prospective employees go to bed at night, how much beer they drink on the weekends, what they eat for breakfast, what kind of cars they drive, where they take their vacations and what hobbies they engage in, all in the interest of making sure that those employees or applicants meet some ideal of health and fitness and thus cost the government less money to insure. This is the real danger of the Florida Supreme Court's decision, and this is the issue which requires consideration by this Court.

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4 *See* Maltby & Dushman, *Whose Life Is It Anyway--Employer Control of Off-Duty Behavior*, 13 St. Louis Pub. L. Rev. 645 (1994); Smith & Francis, *Beyond the Company Town: Employees' Right to Privacy Regarding Off-Duty Conduct*, 158 N.J. Lawyer 13 (Jan. 1994); Hill & Delacenserie, *Procrustean Beds and Draconian Choices: Lifestyle Regulations and Officious Intermeddlers--Bosses, Workers, Courts, and Labor Arbitrators*, 57 Mo. L. Rev. 51 (1992); Kramer & Calder, *The Emergence of Employees' Privacy Rights: Smoking and the Workplace*, 8 The Labor Lawyer 313, 321-22 (1992).

CONCLUSION

On the basis of the arguments and authorities set forth above, the petitioner Arlene Kurtz requests that the Court grant certiorari to consider the important constitutional questions raised by this case.

Respectfully submitted,

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APPENDIX

ADMINISTRATIVE REGULATION 1-46

CITY OF NORTH MIAMI
ADMINISTRATIVE REGULATIONS

Lawrence J. Casey
City Manager

Administrative Regulation 1-46
Approved /s/ Date 03-09-90

ALL DEPARTMENTS

TOBACCO OR TOBACCO PRODUCTS ABSTENTION AS PRE-EMPLOYMENT REQUIREMENT

OBJECTIVE

To reduce the liability exposure to the City of North Miami recognizing that:

1) the Surgeon General of the United States has declared that use of tobacco or tobacco products is a hazard to an individual's health; and
2) an employee's poor health, due to the continued use of tobacco or tobacco products, increases the loss experience of the group insurance plans and group life insurance plans; and
3) increases in loss experience result in increases in premium cost for insurance plans; and
4) increases in premium costs for employees are borne by the General Fund and subsequently by the taxpayers of the City of North Miami.

To reduce the amount of lost productivity time due to absenteeism and on-the-job time lost to the City of North Miami recognizing that:

1) an employee's poor health, due to the continued use of tobacco or tobacco products, increases the amount of

lost work days and limited activity and thus reduces an employee's productivity; and

2) decreases in employee productivity result in the decrease in efficiency of the City government; and

3) decreased efficiency is not an effective use of taxpayer's dollars.

RESPONSIBILITIES

The Personnel Director is responsible for monitoring the compliance of the provisions of this Administrative Regulation.

PROCEDURES

All applicants must be a nonuser of tobacco or tobacco products for at least one year immediately preceding application, as evidence by the sworn affidavit of the application.

DUE PROCESS CLAUSE, U.S. CONST. AMEND. 14

"No State shall . . . deprive any person of life, liberty, or property, without due process of law."

TITLE 42 UNITED STATES CODE SECTION 1983

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

IN THE CIRCUIT COURT FOR THE ELEVENTH
JUDICIAL CIRCUIT IN AND FOR
DADE COUNTY, FLORIDA
GENERAL JURISDICTION DIVISION
CASE NO. 91-3165 (04)

FLA. BAR NO. 444006

ARLENE KURTZ,

Plaintiff,

v.

THE CITY OF NORTH MIAMI,
FLORIDA,

Defendant.
_____/

COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

The plaintiff, Arlene Kurtz, sues the defendant, the City of North Miami, and says:

1. This is an action for injunctive and declaratory relief pursuant to title 42 United States Code section 1983 and Florida Statutes section 86.011.

2. The plaintiff, Arlene Kurtz (hereinafter "Kurtz"), is a resident of the City of North Miami, Dade County, Florida.

3. The defendant, the City of North Miami, Florida (hereinafter "the City"), is a Florida municipal corporation.

ALLEGATIONS APPLICABLE TO BOTH COUNTS

4. On or about December, 1989, Kurtz took and passed a written examination required for all prospective applicants for

employment by the City of North Miami.

5. On or about May 1990, the City notified Kurtz that there was an opening for a clerk/typist, and made an appointment with Kurtz to interview her for that position.

6. When Kurtz arrived at the interview on or about May 31, 1990, she was informed by the interviewer that in order to be hired for any job with the City of North Miami, Kurtz would be required to sign an affidavit stating that she did not currently smoke cigarettes or used any other tobacco products and that she had not smoked cigarettes or used any other tobacco products for the past twelve months.

7. Kurtz told the interviewer that she could not truthfully sign such an affidavit. The interviewer then told Kurtz that there was no point in proceeding with the interview, and terminated the interview.

8. Following that terminated interview, Kurtz has not been notified of or considered for any position with the City of North Miami.

9. Aside from her refusal to sign the affidavit required by the City of North Miami, Kurtz was and is qualified for the position of clerk/typist.

10. The City of North Miami has officially adopted a policy requiring all applicants for employment with the City to execute affidavits stating that they do not use tobacco products and have not used tobacco products for the past twelve months (hereinafter referred to as "the policy"). Any person who refuses to sign such an affidavit will not be considered for employment by the City in any capacity or position.

11. The City's policy against hiring smokers and persons who have smoked within the past twelve months applies to all job positions, and prohibits the hiring of such persons, regardless of whether the applicants are otherwise qualified for any particular jobs.

12. The City's stated purpose in adopting this policy is to reduce the City's health insurance costs and is unrelated to the City's legitimate interest in ensuring that applicants for employment are qualified to carry out their duties and responsibilities.

13. The City's stated cost-saving rationale is not a legitimate justification for denial of prospective employees' constitutional rights.

14. The City's policy wrongfully conditions applicants' eligibility for City employment upon their agreeing to relinquish their constitutional privacy and liberty interests in lawful, off-duty conduct unrelated to their job qualifications and performance.

15. By raising an irrebuttable presumption that persons who smoke off-duty or who have smoked within the past twelve months are unqualified for employment by the City in any capacity, the City's policy violates the excluded applicants' rights to due process of law.

16. The City's policy violates due process by barring off-duty smokers and persons who have smoked within the past twelve months from all City employment, and not only from those positions as to which past or present smoking activity is or may be a relevant and rational hiring criterion.

17. The requirement of disclosure by applicants of off-duty smoking activity unrelated to job performance is a violation of due process of law.

18. The City's policy is violative of equal protection because it arbitrarily and on the basis of impermissible criteria distinguishes job applicants who smoke off-duty or who have smoked within the past twelve months from job applicants and present City employees who do not smoke or have not smoked within the past twelve months.

19. The challenged policy violates the right of persons to be free from governmental intrusion into their private lives.

COUNT I--INJUNCTION

20. Paragraphs 1 through 19 are incorporated herein by reference.

21. The City's policy the Fourteenth Amendment to the Constitution of the United States, which provides in pertinent part, "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its

jurisdiction the equal protection of the laws."

22. By implementation and enforcement of its policy, the City has deprived Kurtz of rights secured by the above-cited constitutional provisions.

23. Pursuant to title 42 United States Code section 1983, Kurtz requires and is entitled to an injunction against the City's enforcement of its policy.

WHEREFORE, the plaintiff Arlene Kurtz demands judgment against the City enjoining it from the continued enforcement of the challenged policy, and for attorneys' fees pursuant to title 42 United States Code section 1988, and for costs of this action.

COUNT II--DECLARATORY RELIEF

24. Paragraphs 1 through 19 are incorporated herein by reference.

25. The City's policy violates article I, section 2 of the Florida Constitution, which provides in pertinent part, "All natural persons are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, [and] to be rewarded for industry . . . ."

26. The City's policy violates article I, section 9 of the Florida Constitution, which provides in pertinent part, " No person shall be deprived of life, liberty, or property without due process of law . . ."

27. The City's policy violates article I, section 23 of the Florida Constitution, which provides in pertinent part, "Every natural person has the right to be let alone and free from governmental intrusion into his private life . . . ."

28. Kurtz requires and is entitled to a declaration by this Court that the City's policy, as a result of which she was denied the opportunity for fair consideration for public employment, violates the above-cited provisions of the Florida Constitution.

WHEREFORE, the plaintiff Arlene Kurtz demands judgment

declaring the City's policy unconstitutional under the Florida Constitution, for such other relief as is necessary and proper to effect the Court's judgment, and for costs of this action.

Dated: January 22, 1991

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

IN THE CIRCUIT COURT FOR THE ELEVENTH
JUDICIAL CIRCUIT IN AND FOR
DADE COUNTY, FLORIDA
GENERAL JURISDICTION DIVISION
CASE NO. 91-3165 (04)

ARLENE KURTZ,

Plaintiff,

v.

THE CITY OF NORTH MIAMI,
FLORIDA,

Defendant.
_____/

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

The plaintiff Arlene Kurtz moves the Court, pursuant to rule 1.510 of the Florida Rules of Civil Procedure, for entry of summary judgment in her favor, on the grounds set forth herein.

I. INTRODUCTION

The plaintiff seeks injunctive and declaratory relief against a policy of the defendant City of North Miami, which policy requires all job applicants to execute affidavits stating that they do not smoke or use tobacco products and have not done so within the preceding twelve months.

The plaintiff claims that the policy violates the United States and Florida Constitutions, and seeks an injunction pursuant to 42 United States Code section 1983 and declaratory relief pursuant to Florida Statutes section 86.011.

There is no genuine issue as to any material fact, and the plaintiff is entitled to a judgment as a matter of law. The plaintiff

therefore requests that the Court enter summary judgment in her favor, enjoining the City from enforcing its no-smoking hiring policy and declaring that policy unconstitutional under the U.S. and Florida Constitutions.

II. STATEMENT OF MATERIAL FACTS AS TO WHICH NO GENUINE ISSUE EXISTS

1. The City has officially adopted a policy requiring all applicants for employment with the City to execute affidavits stating that they do not use tobacco products and have not used tobacco products for the past twelve months. (Complaint ¶ 10; Answer ¶ 10; Def's Response to Pltf's Req. for Admissions ¶ 1).

2. Any person who refuses to sign such an affidavit will not be considered for employment by the City in any capacity or position. (Complaint ¶ 10; Answer ¶ 10; Def's Response to Pltf's Req. for Admissions ¶ 2).

3. The effect of the policy is such that, in order even to be considered for any City job, a prospective applicant must forbear to smoke or use tobacco for a period of one year prior to the date of hire. (Def's Answers to Pltf's Interrogs. ¶ 1).

4. While the City's asserted justification for its policy is the reduction of health care costs by preventing smoking related illnesses among its employees (Answer ¶ 32), the City does not bar its present employees from smoking and does not bar new employees, once hired, from beginning to smoke. (Def's Answers to Pltf's Interrogs. ¶ 1).

5. The City's policy against hiring smokers and persons who have smoked within the past twelve months applies to all job positions, and prohibits the hiring of such persons, regardless of whether the persons are otherwise qualified for any particular jobs. (Def's Response to Pltf's Req. for Admissions ¶ 3).

6. Persons already employed by the City prior to the adoption of the policy were not required to execute affidavits regarding their present or past smoking or tobacco use as a condition of their continued employment by the City. (Def's Response to Pltf's Req. for

Admissions ¶ 4).

7. Persons already employed by the City prior to the adoption of the policy were not required to quit smoking or using tobacco products as a condition of their continued employment by the City. (Def's Response to Pltf's Req. for Admissions ¶ 5).

8. City job applicants who are smokers or tobacco users are not individually screened or examined to determine their actual health conditions or medical histories. (Def's Response to Pltf's Req. for Admissions ¶ 7).

9. The City does not offer job applicants who are smokers or tobacco users the option of waiving insurance coverage for smoking related illnesses as a condition of employment. (Def's Response to Pltf's Req. for Admissions ¶ 9).

10. The City does not offer job applicants who are smokers or tobacco users the option of paying any increased insurance premiums or costs resulting from their smoking or tobacco use as a condition of employment. (Def's Response to Pltf's Req. for Admissions ¶ 10).

11. In December 1989, the plaintiff Arlene Kurtz took and passed a written examination required for all prospective applicants for employment by the City. (Complaint ¶ 4; Answer ¶ 4; Affid. of Arlene Kurtz ¶ 2).

12. The City's policy against hiring smokers and persons who have smoked within the past twelve months applies to all job positions, and prohibits the hiring of such persons, regardless of whether the applicants are otherwise qualified for any particular jobs. (Complaint ¶ 11; Answer ¶ 11).

13. In May 1990, the City notified Kurtz that there was an opening for a clerk-typist, and made an appointment to interview her for that position. (Complaint ¶ 5; Answer ¶ 5; Affid. of Arlene Kurtz ¶ 3).

14. When Kurtz arrived for the interview on May 31, 1990, she was informed by the interviewer that in order to be hired for any

job with the City, she would have to sign an affidavit stating that she did not smoke or use tobacco products and that she had not done so within the past twelve months. (Complaint ¶ 6; Answer ¶ 6; Affid. of Arlene Kurtz ¶ 4).

15. Kurtz told the interviewer that she could not truthfully sign such an affidavit, and the interview was terminated. (Complaint ¶ 7; Answer ¶ 38; Affid. of Arlene Kurtz ¶ 5).

16. Since that terminated interview, Kurtz has not been notified of any other job openings with the City of North Miami. (Affid. of Arlene Kurtz ¶ 9).

17. Kurtz was in May 1990 and is now qualified for the job of clerk-typist. (Affid. of Arlene Kurtz ¶ 7).

18. Kurtz would be willing to abide by a reasonable restriction on smoking while on duty or where smoking would affect her fellow employees or others, as a condition of employment by the City. (Affid. of Arlene Kurtz ¶ 8).

III. THE PLAINTIFF IS ENTITLED TO JUDGMENT AS A MATTER OF LAW

1. Privacy

The City's no-smoking hiring policy constitutes governmental intrusion into the private lives of citizens for the purpose of regulating lawful, off-duty conduct unrelated to any legitimate need of government. For citizens, such as the plaintiff, who refuse to submit to this indirect regulation, the penalty is a denial of all opportunity to seek or obtain employment in City government.

Article I, section 23, of the Florida Constitution provides, "Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein." This explicit constitutional right of privacy is far broader than that provided by the general due process language of the U.S. Constitution. In re T.W., 551 So.2d 1186, 1192 & n.5 (Fla. 1989); Shaktman v. State, 553 So.2d 148, 151 n.9 (Fla. 1989); Winfield v. Division of Pari-Mutuel

Wagering, 477 So.2d 544 (Fla. 1985). In cases involving violations of the privacy guarantee, the government has the burden of demonstrating a "compelling state interest" justifying the intrusion, and that the "least intrusive means" have been used to accomplish that goal. Shaktman, 553 So.2d at 151-52; In re T.W., 551 So.2d at 1192; Winfield, 477 So.2d at 547.

The decision whether or not to engage in the completely legal use of tobacco products in one's own home and on one's own time is a matter which should be left to the individual. Before the City is allowed to condition employment on the relinquishment of personal autonomy by its citizens, it must demonstrate a compelling state interest justifying that action. The City's asserted interest in reducing its medical costs is not such a "compelling" interest as to justify the challenged hiring policy.

Moreover, even if the City's interest were deemed to be "compelling," the City has clearly not employed the "least intrusive means" of furthering that interest. The City's aim of reducing health care costs could be achieved, for example, by limiting insurance benefits for smoking-related illnesses or by requiring that higher premiums be paid by employees with particular health risks. The City admits that it does not give smoking employees these options. Nor does the City allow smokers to waive health insurance coverage entirely.

That the means chosen are not the least intrusive is obvious when it is noted that the City's policy requires all prospective job applicants to refrain from smoking for a year, in order even to be considered for a City job. Many if not most of those applicants will probably not ever be hired, but they are nonetheless constrained by the policy to give up this lawful conduct in order to have even an opportunity for consideration. Clearly, the City can have no interest in precluding smoking by persons it will not ultimately hire. That the City presumes to dictate such persons' private lives demonstrates that its policy is far from the "least intrusive" that could be devised to obtain its asserted goal of reducing its employees health care costs.

In short, the City could achieve its goal by any number of approaches tailored to the actual health risks and costs presented by individual employees, without resorting to intrusive regulation of employees' private, lawful, off-duty conduct. The City has chosen,

however, to use instead the most intrusive means available--requiring absolute abstinence for a year prior to even being considered for a City job.

The City asserts in its answer that the plaintiff, when she applied for a job with the City, executed a waiver of confidentiality and permission for a background investigation. The City argues that the plaintiff thereby "waived" her constitutional privacy interest. Even if the City's factual allegations are conceded for purposes of this motion, the City's legal argument is flawed. If the City's employment application requires a surrender of one's constitutional right of privacy, then that requirement is itself clearly unconstitutional. See McDonnell v. Hunter, 809 F.2d 1302, 1310 (8th Cir. 1987) (state could not require applicants to give advance consent to unreasonable searches as condition of employment); also Keyishian v. Board of Regents, 385 U.S. 589, 17 L.Ed.2d 629 (1967).

Moreover, the City's position mischaracterizes the purpose and scope of the constitutional privacy guarantee. The right of privacy is not only a right of secrecy or confidentiality. The constitutional right of privacy is the right "to be let alone" and extends to many areas where the individual's interest is not in secrecy but in personal autonomy. See, Winfield, 477 So.2d at 546; In re T.W., 551 So.2d at 1192; In re Guardianship of Browning, 568 So.2d 4, 9-12 (Fla. 1990).

The City's policy clearly violates the Florida Constitution's guarantee of privacy as set forth in article I, section 23, and the plaintiff requests that the Court enter summary judgment so holding and granting her injunctive and declaratory relief as requested in the complaint.

2. Substantive Due Process

The City's ban on hiring smokers violates Kurtz's right to substantive due process by denying her government employment opportunities on a basis unrelated to the functions of the job sought or to her ability and qualifications to carry out those job functions.

In the context of governmental hiring decisions, substantive due process requires that any standards applied in making such decisions have a rational connection with the applicant's fitness or capacity to

perform the job sought. Attaching unreasonable and arbitrary requirements to job eligibility violates substantive due process. Grusendorf v. City of Oklahoma City, 816 F.2d 539, 542 (10th Cir. 1987).

There are many instances of employment restrictions being struck down on the ground that they were not rationally related to the actual job functions. In Lindquist v. City of Coral Gables, 323 F.Supp. 1161 (S.D. Fla. 1971) the district court, applying a rational basis standard of review, held that a fire department rule prohibiting firemen from wearing sideburns extending below their earlobes bore no relationship to the proper functioning of the fire department, and violated the plaintiff's substantive due process right to determine his own personal appearance. Id. at 1163-64. In Hander v. San Jacinto Junior College, 519 F.2d 273 (5th Cir. 1975), the former Fifth Circuit held that a college's rule prohibiting male teachers from wearing long hair was unconstitutional because the rule had no "relevance to legitimate administrative or educational functions." Id. at 277.

Where a government seeks to restrict employment on the basis of prior or off-duty conduct by job applicants, such restrictions must also be rationally related to the on-duty requirements of the job. Osterman v. Paulk, 387 F.Supp. 669, 670-71 (S.D. Fla. 1974).

In Osterman, the court held that a Civil Service standard prohibiting the employment of anyone who had used marijuana during the past six months was unconstitutional as applied to an applicant for a clerk position, on the ground that there was no "rational nexus" between the off-duty or prior conduct and the duties of the job in question. Id.

The court noted that under Florida Statutes section 112.011, prior criminal conduct, even a prior felony conviction, was no bar to public employment unless the crime "directly relates" to the specific job sought. Id. at 671. In relation to this, the court stated:

> The anomaly of the City's position is shown when it is recognized that a prior conviction for an unrelated felony could not bar the plaintiff's employment while a single use of marijuana within the previous six months (if established) renders her

ineligible.

Id.

In Andrews v. Drew Municipal Separate School District, 507 F.2d 611 (5th Cir. 1975), cert. dismissed, 425 U.S. 559 (1976), the former Fifth Circuit struck down a school district's practice of refusing employment to parents of illegitimate children, because the practice was not rationally related to any legitimate educational goals of the school district. Id. at 614-17.[1]

Restrictions on off-duty smoking must also be rationally related to a particular job's functions in order to pass constitutional muster, as held in Grusendorf v. City of Oklahoma City, 816 F.2d 539 (10th Cir. 1987). In that case, a fire department's rule prohibited firefighter trainees from smoking on or off duty for one year after hiring, and required new hirees to sign an agreement to that effect as a condition of employment. Id. at 540. The court clearly recognized that the rule infringed upon protected liberty and privacy interest, stating:

> It can hardly be disputed that the Oklahoma City Fire Department's non-smoking regulation infringes upon the liberty and privacy of the firefighter trainees. The regulation reaches well beyond the work place and well beyond the hours for which they receive pay. It burdens them after their shift has ended, restricts them on weekends and vacations, in their automobiles and backyards and even, with the doors closed and the shades drawn, in the private sanctuary of their own homes.

Id. at 541.

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1 The court emphasized that it was invalidating the practice using the rational relationship test, and never reached the question of whether the practice also constituted discrimination on the basis of sex, which would have required a higher standard of review. Id. at 613, 614 & n.5.

While the Tenth Circuit acknowledged that the liberty and privacy interests at issue in the case of a no-smoking rule may not rise to the level of a fundamental right, the Court also emphasized that even non-fundamental rights are entitled to meaningful protection against governmental infringement. The court stated:

> Nor are we inclined to accept the defendants' contention that, since cigarette smoking has not been recognized as a fundamental right, no balancing test nor rationale of any kind whatsoever is needed to justify the restriction. This reasoning would seem to suggest that the state can, arbitrarily and for no reason, condition employment upon an agreement to refrain from a nearly limitless number of innocent, private and personal activities. We would be reluctant to go this far even if the law would tolerate such a venture.

Id. at 542.

In Grusendorf the court upheld the no-smoking rule, but only upon finding a "rational connection between the non-smoking regulation and the promotion of the health and safety of the firefighter trainees." The court noted that good health and physical conditioning are essential requirements for firefighters who "are frequently exposed to smoke inhalation," where "it might reasonably be feared that smoking increases this health risk." Id. at 543.

In contrast to the restriction on off-duty smoking upheld in Grusendorf, the City of North Miami's no-smoking hiring policy admittedly has no relationship to the qualifications of the applicant or the requirements of the job sought. The City's policy, in contrast, violates substantive due process by denying applicants all opportunities in government employment, for reasons unrelated to their fitness or qualifications for any particular job.

The City concedes that its policy is unrelated to job qualifications, but asserts that its goal of reducing health insurance costs justifies the policy. Even if that objective were a legitimate goal of government when it results in the turning-away of qualified applicants, the no-smoking hiring rule is not a way of "rationally" achieving that goal. If the policy were actually and rationally to serve the goal of

reducing the City's health insurance and medical costs, it would focus on its employees' health and medical histories, rather than on the fact that a job applicant engages or has engaged in one type of off-duty conduct, smoking.

Moreover, if in fact the City's policy was designed to reduce smoking-related health costs among its employees, it would forbid smoking by persons after, rather than before, they were hired. Here, a person hoping to get a job with the City must give up smoking a year in advance in the mere hope of getting a City job, and only persons who have done so are deemed worthy of employment by the municipality. However, once employed, the City does not require that a person continue to abstain from smoking. Also, those employed prior to the adoption of the no-smoking hiring policy can continue their smoking unabated, notwithstanding any additional health costs that may result. Clearly, if the City's real interest were in health costs, it would focus its regulatory activity at its actual employees rather than on creating artificial, irrational requirements for all job applicants.

Even if smoking were, in some cases, an indicant of potential health problems and increased medical costs, the rational way of addressing that issue would be in connection with the decision of whether or under what terms to provide health insurance, not in the decision of whether or not to hire in the first place. Refusing to hire smokers at all is not a rational way to achieve the goal of controlling health costs. Rather, the City could limit coverage for smoking related illnesses or require smokers to pay higher insurance premiums.

The irrational effect of this policy is that the City would deny employment even to a smoker who would not be covered under the City's group health plan, and who would thus cost the City nothing in insurance costs. For example, some job applicants may not wish or intend to join the City's health plan, because they have coverage under their spouses' group plans. The City's health-cost justification is clearly specious as applied to these individuals, and yet the City's no-smoking policy would deny these individuals employment.

Moreover, the City has admitted that it will not permit smoking employees to waive or pay an extra premium for their insurance coverage in order to obviate or defray the supposed added health care costs. In light of this admission, in particular, it is clear that the City's

no-smoking hiring policy is not really or rationally aimed at curtailing health costs. Rather, it is blatant discrimination against persons who engage in a particular conduct of which the City government disapproves.

Because the City's policy has absolutely no relation to job qualifications or functions, and no rational or logical relation to the City's interest in reducing insurance costs, it violates the plaintiff's right to substantive due process guaranteed under the Florida and United States Constitutions. U.S. Const. Amend. 14; Fla. Const. art. I, § 9. The plaintiff therefore requests that the Court enter summary judgment so holding, and granting her injunctive and declaratory relief as requested in the complaint.

3. Procedural Due Process

The City deprived Kurtz of procedural due process by barring her from all government employment opportunities based on the irrebuttable presumption that hiring Kurtz would increase the City's self-insured medical expenses. The City admits that job applicants who are smokers are not screened to determine their actual, individual health status, and are thus given no opportunity to rebut the City's presumption regarding their likely insurance risk. Procedural due process, however, requires that Kurtz be given some opportunity to rebut the correctness of that presumption in her individual case.

While an applicant for employment ordinarily does not have such a "property right" in the job applied for as to invoke the protections of procedural due process, there are certain circumstances in which a job applicant is entitled to procedural due process prior to being denied employment. One such circumstance is where governmental action not only denies an applicant a particular job, but also forecloses the applicant from seeking all other employment by the government.

In the case of Board of Regents v. Roth, 408 U.S. 564, 33 L.Ed.2d 548 (1972), the Court held that a non-tenured college teacher, with no contractual or other "property" right to renewal of his annual contract, was not entitled to a statement of reasons and a hearing prior to the state's non-renewal of his contract. Id. at 576-79, 33 L.Ed.2d at 560-62. The Court was careful to note however, that the plaintiff was

not foreclosed from seeking other employment within the state university system, and stated that if that had been the case the outcome would have been different. The Court stated:

> [T]here is no suggestion that the State, in declining to re-employ the respondent, imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities. The State, for example, did not invoke any regulations to bar the respondent from all other public employment in state universities. Had it done so, this, again, would be a different case. For "[t]o be deprived not only of present government employment but of future opportunity for it certainly is no small injury . . . ." The Court has held, for example, that a State, in regulating eligibility for a type of professional employment, cannot foreclose a range of opportunities "in a manner . . . that contravene[s] . . . Due Process."

Id. at 573-74, 33 L.Ed.2d at 559 (citations omitted).

Procedural due process is denied when all opportunities for government employment are denied to a person on the basis of "an irrebuttable presumption, as to which the presumed fact does not necessarily follow from the proven fact." Andrews v. Drew Municipal Separate School Dist., 507 F.2d 611, 614 (5th Cir. 1975), cert. dismissed, 425 U.S. 559 (1976); see Fewquay v. Page, 682 F.Supp. 1195, 1998 (S.D. Fla. 1987), aff'd, 896 F.2d 558 (11th Cir. 1990).

In this case the plaintiff was not only denied the job of clerk-typist with the City, but she is also barred from seeking any other position within City government. The basis for the City's policy is an irrebuttable presumption that all smokers and all persons who have smoked within the twelve months are unhealthy or are poor insurance risks. The plaintiff is denied procedural due process because she has no opportunity to rebut that presumption in her case and to establish that, smoking notwithstanding, she is otherwise healthy, capable of performing her job, and does not present an unacceptable insurance risk.

The undisputed facts in this case demonstrate that the plaintiff

was denied procedural due process in violation of the 14th Amendment to the United States Constitution and Article I, Section 9 of the Florida Constitution, and the plaintiff requests that the Court enter judgment in her favor so finding, and granting her injunctive and declaratory relief.

4. Equal Protection

The City's no-smoking policy creates two discriminatory classification schemes in violation of the plaintiff's right to equal protection--

(a) The first classification scheme creates two classes of job applicants: one class consisting of applicants who use tobacco products or have used them within the preceding twelve months; and another class consisting of all other job applicants.

(b) The second classification scheme creates two classes of City employees: one class consisting of newly hired employees who are required as a condition of employment to refrain from using tobacco for at least a year; and another class consisting of persons employed by the City prior to the implementation of the policy and who are not required to change or suspend their smoking conduct in any respect in order to keep their City jobs.

The City's asserted goal in creating these classification schemes is to reduce its self-insured medical costs. Even conceding that reduction of medical costs is a legitimate goal of the City, the issue remains whether or not the classification schemes formulated by the City rationally serve that goal. Bowman v. Town of Pennsauken, 709 F.Supp. 1329, 1338-39 (D.N.J. 1989).

As stated by the former Fifth Circuit Court of Appeals, "[T]he issue is not simply whether the objective is itself legitimate, but rather whether the . . . rule 'advances that objective in a manner consistent with the Equal Protection Clause'." Andrews v. Drew Municipal Separate School District, 507 F.2d 611, 614 (5th Cir. 1975), cert. dismissed, 425 U.S. 559 (1976) (citation omitted).

a. Classification of job applicants

Classifying job applicants on the basis of smoking alone does not rationally serve the City's interest in reducing medical costs, and therefore violates the Equal Protection Clause.

The City places smokers in a category separate from all other job applicants, on the asserted basis that smokers have potential health problems and higher medical expenses. However, that category is patently underinclusive, because there are many other types of applicants besides smokers who may have more serious health problems and incur medical expenses as high as or higher than smokers.

Smokers are not per se unhealthy, but the City's classification scheme bars even healthy smokers from employment, while it does not bar others whose potential or actual health problems are just as great. For example, persons with diabetes, cancer, or AIDS would not be barred from employment by the City, even though the medical costs for persons with those diseases would almost certainly be as high as or higher than for a smoker or former smoker whose general health is good.

The City's classification scheme for job applicants is also underinclusive in that it would not bar employment of persons who engage in other kinds of conduct that may result in high medical costs. Automobile racers, IV drug users, and people who engage in high-risk sexual activity all face the prospect of health problems as a consequence of their prior or off-duty activities, but the only activity prohibited by the City is the use of tobacco.

The case of Bowman v. Town of Pennsauken, 709 F.Supp. 1329, 1338-39 (D.N.J. 1989), is analogous to the present case. In that case, a town police department imposed restrictions on officers who wished to moonlight as security guards, requiring employers of these off-duty officers to indemnify the town and limiting the hourly wages officers could make as security guards. 709 F.Supp. at 1332-33. Officers pursuing off-duty work in all fields other than security positions were not subject to the restrictions.

The court held that the restrictions created a classification scheme in which officers doing off-duty security work were treated

differently than officers doing other types of off-duty work. Id. at 1338-39. The court held that the appropriate standard of review was whether or not the restrictions bore a rational relationship to a legitimate state interest. Id. at 1339.

The court held that the township had a legitimate interest in regulating its police department, and "such goals as reducing mental and physical fatigue, limiting litigation and lessening liability insurance expenses serve as legitimate government interests supporting regulation." Id. The town's asserted rationale for imposing the restrictions only on moonlighting security guards was that the restrictions would limit the town's exposure to tort suits resulting from the officers' off-duty actions. Id.

The classification scheme set up by the town, however, did not rationally serve those legitimate goals, because the classification subject to the restrictions was "underinclusive." Id. at 1342. The court found that officers doing many types of off-duty work, such as cabdrivers, presented just as much or more of a liability risk to the township as did officers engaged in security work. Therefore, applying the restrictions only to security work was an irrational means of achieving the town's stated goal. Id. at 1343. The court stated:

> The Township, by attempting to regulate the outside employment of the police officers, has created exceptions that run counter to and destroy the underlying rationale for the Resolution. The justification offered, by the Township as a legitimate state interest is eroded, due to the exception that officers engaged in non-security work are not subject to the Resolution. . . .
>
> . . . .
>
> . . . . A police officer working as a cabdriver who witnesses an assault or theft and responds to it could present a greater insurance risk to the Township than an off-duty security officer. This illustration is only one example, but it clearly demonstrates the problem of the Resolution's classification. Therefore, the Township's asserted interest in reducing insurance costs and liability

crumbles under the actual application of the Resolution.

Id. at 1342-43. The district court in Bowman held that the restrictions on off-duty security work were clearly arbitrary and unconstitutional on their face. Id. at 1343.

Likewise in this case, the category of unhireables in which the plaintiff is placed violates equal protection both because that class is underinclusive and because it does not rationally relate to health or likely insurance risk.

b. Classification of City employees

The City's policy of requiring job applicants to give up smoking for at least a year prior to consideration, while allowing present employees to continue to smoke unabated and while allowing new employees to begin smoking once hired, is even more patently irrational. If smoking itself presents an unacceptable health risk, then there is no logical or rational basis for permitting employees to continue or begin to smoke while requiring job applicants to refrain for a year.

This classification scheme, even if it did have the actual effect of reducing overall medical costs for the City, is irrational because it is blatantly arbitrary. For example, the City could undoubtedly slash its overall medical expenses by only providing insurance coverage for persons whose names begin with the letters A through M, while denying coverage to N through Z. Such a plan, though it would certainly be an effective cost-reduction strategy, would be unconstitutional because it is arbitrary and capricious. In the same way, imposing an no-smoking requirement on some employees solely on the basis of their dates of hire is arbitrary and violative of equal protection for the persons adversely affected.

The Tenth Circuit Grusendorf case similarly involved a smoking ban on firefighter trainees but not on more senior firefighters. The court noted that this irrational and discriminatory aspect of the rule may have presented an equal protection violation, because good respiratory health (the defendant's asserted justification for the rule) is equally important for all firefighters regardless of seniority. The plaintiff in Grusendorf had not raised the equal protection issue,

however, and the court refused to rule on it sua sponte. 816 F.2d at 543. The Bowman court cited this language of the Tenth Circuit in Grusendorf. 709 F.Supp. at 1343.

In the present case, the application of the no-smoking policy to new employees but not to existing employees completely undercuts and negates the City's purported cost-saving rationale. Even if smoking indeed creates additional costs to the City, the policy of prohibiting some but not all employees from smoking is a patently arbitrary and capricious means of reducing those costs, and thus violates equal protection.

The undisputed facts in this case demonstrate that the City's classification of job applicants and employees on the basis of off-duty smoking violates equal protection. By being arbitrarily placed in a category of "unhireable" persons, the plaintiff was denied equal protection of the law, in violation of the 14th Amendment to the United States Constitution and Article I, Section 2 of the Florida Constitution. The plaintiff requests that the Court enter judgment in her favor so finding, and granting her injunctive and declaratory relief.

IV. RELIEF REQUESTED

On the basis of the undisputed material facts in this case and the legal arguments set forth above, the plaintiff requests that the Court enter a declaratory judgment, authorized by Florida Statutes section 86.011, holding that the City's policy violates the Florida Constitution and the United States Constitution.

The plaintiff also requests that the Court enter an injunction against the City's enforcement and implementation of its off-duty smoking policy. Issuance of such an injunction is authorized by Florida Statutes section 86.061 as supplemental relief based on a declaratory judgment. Insofar as the Court finds that the City's policy violates the United States Constitution, such an injunction is also authorized by title 42 United States Code section 1983.

The plaintiff also requests that the Court award her her attorneys' fees and costs incurred in this action, pursuant to 42 United States Code section 1988.

OPINION OF THE TRIAL COURT

IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT
IN AND FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION
CASE NO. 91-3165 (04)

ARLENE KURTZ,

Plaintiff,

vs.

THE CITY OF NORTH MIAMI, FLORIDA,

Defendant.
_____/

FINAL SUMMARY JUDGMENT

Facts

The City of North Miami is a municipality in Dade County, Florida. Plaintiff, Arlene Kurtz, applied for a position as clerk typist with the City. In December, 1989, Ms. Kurtz passed a written exam for this position. Six months later, Kurtz was notified of an opening and, along with others, was invited for an interview.

On March 9, 1990 North Miami City Manager, Lawrence C. Casey, promulgated administrative regulation 1-46. (See attached exhibit 1). [App. A-1]. One objective of this regulation was to reduce the City's liability exposure. The Manager recognized that the Surgeon General of the United States has declared that the use of tobacco and tobacco products is a health hazard. The Manager further recognized that an employee's poor health increases the loss experience of group health and life insurance plans which result in increased premium costs for employees which are directly borne by the City's taxpayers. The second objective of the regulation was to reduce lost productivity time due to health related absenteeism. To meet these objectives the

Manager decreed that future job applicants must be non-users of tobacco and tobacco products for at least one year immediately preceding application for employment and must verify same by affidavit.

The regulation addresses potential hirees. It neither regulates nor attempts to regulate current employees or new non-smoking employees once they begin employment.

Arlene Kurtz appeared for her interview on May 31, 1990, and was advised that she was required to execute a non-smoking affidavit. Kurtz told the interviewer that she was a smoker and could not truthfully sign the affidavit. The interviewer told Ms. Kurtz she could continue with the interview but she would not be considered for employment until she was "smoke-free" for a one year period. The interview was discontinued.

Kurtz contends she was and is qualified for the position of clerk typist. She is willing to abide by any reasonable smoking restrictions while on the job as a condition of employment.

Plaintiff contends that the City's policy violates her rights as protected by the Fourteenth Amendment of the United States Constitution, and Article I, Sections 2, 9, and 23 of the Florida Constitution. The City responds that it's policy has a rational relationship to the objectives of the regulation.

The parties agree that no material issue of fact remains in dispute and that this matter is ripe for determination by summary judgment. The parties have submitted lengthy memoranda and numerous exhibits in support of their respective positions.

The Court has reviewed the pleadings, motions, memoranda and cases cited, and all exhibits and studies submitted, and concurs with the parties that no issue of material fact remains. Accordingly, the entry of summary judgment is warranted.

Constitutional Provisions

Article XIV, Section I of the United States Constitution provides that no State shall deprive any person of life, liberty, or property without due process of law nor shall any State deny any person

within its jurisdiction the equal protection of the laws.

Article I, Section 9 of the Florida Constitution reiterates the Federal due process clause, while Article I, Section 2 of the Florida Constitution sets forth the State's equal protection provision.

There is no specific provision in the United States Constitution addressing privacy; however, such a right is inherently recognized. In 1980, Florida adopted a privacy right as Article I, Section 23 of our Constitution. It provides that every natural person has the right to be let alone and be free from governmental intrusion into his private life.

The question presented then is whether the regulation promulgated by the North Miami City Manager violates any of the aforementioned constitutional provisions and Plaintiff's rights?

I.

Does the City's Policy Against Hiring Tobacco Users Violate a Job Applicant's Substantive Due Process Rights as Prescribed by the United States Constitution?

The first issue to address is whether the United States Constitution considers the right to use tobacco and tobacco products as a fundamental privacy or liberty right? In Carey v. Population Services Int., 431 U.S. 678, 97 S.Ct. 2010, 52 L.Ed.2d 675 (1977), the Supreme Court discussed fundamental privacy freedoms and enunciated that freedoms embracing personal decisions relating to marriage, procreation, contraception, family relationships, child rearing and education would be considered fundamental. Smoking was not mentioned.

In Grusendorf v. City of Oklahoma City, 816 F.2d 539 (10th Cir. 1987), a fire fighter trainee challenged the constitutionality of a city regulation prohibiting smoking on and off duty for a period of one year after commencing employment as a fire fighter. The Court, in addressing the issue of fundamental rights, was not willing to state that smoking, under this regulation, was fundamental and protected.

Plaintiff cites Kelley v. Johnson, 425 U.S. 238, 96 S.Ct. 1440, 47 L.Ed.2d 708 (1976), a case involving a regulation governing hair

grooming for male police officers, in support of her position. While the Supreme Court utilized a rational relationship test in reaching its conclusion, it was not willing to conclude that the regulation affected a fundamental right. Kelley is not supportive of Plaintiff's position.

In Laird v. State, 342 So.2d 962 (Fla. 1977), the only Florida case addressing smoking as a fundamental right, the Supreme Court specifically found there is no fundamental right to smoke marijuana even in the privacy of one's home. The difference, of course, is that Laird addresses an illegal item - marijuana - while in the instant case, all tobacco products are involved. Laird offers no assistance in analyzing the question.

Two cases commonly cited in support of one's right to work in a chosen area as being a fundamental right are Hampton v.Mow Sun Wong, 426 U.S. 88, 96 S.Ct. 1895, 48 L.Ed.2d 495 (1976) and Schware v. Board of Bar Examiners of the State of New Mexico, 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed.2d 796 (1957). While these cases relate to employment rights, more specifically, they address considerations of aliens in Hampton and free speech in Schware as affecting one's employment right. The cases do not consider the issue of employment itself as a fundamental right affected by substantive due process.

This Court concludes that the United States Constitution does not recognize the right to smoke or the right to pursue a chosen occupation as a fundamental right enjoyed by the citizens of this country. Since no fundamental right is involved, the City is not required to show a compelling state interest buy must only demonstrate a rational relationship between the regulation and that which it attempts to accomplish.

The next issue to consider then is whether there is a rational relationship between the tobacco regulation and its objective. Also, does the objective encompass a legitimate governmental interest?

Plaintiff urges this Court to narrowly interpret the rational relationship test. She argues that the dictates of Osterman v. Paulk, 387 F.Supp. 669 (S.D. Fla. 1974) should be applied. The City of Miami Civil Service Board had adopted a regulation requiring job applicants to take a polygraph exam regarding past marijuana use. The Court rejected this regulation finding there was no rational nexus between any

off-duty or prior conduct and the duties of the job in question.

In DiIulio v. Board of Fire & Police Commissioners of Northlake, 682 F.2d 666 (7th Cir. 1982), the Seventh Circuit held that there must be a rational connection between an applicant's fitness or capacity to serve in the job sought and the standards being applied. In DiIulio, a claim was made that a promotional exam was arbitrary, capricious and discriminatory and the questions on the exam were not related to any legitimate promotional scheme. The Court recognized that unreasonable and arbitrary requirements violate constitutional due process and stated there can be no arbitrary deprivation by the government of a person's liberty to engage in any occupation. The Court went on to hold, however, that a governmental body's articulated reasons for the questions showed a rational connection to the job sought and denied the applicant's challenge.

Diaz v. U.S. Postal Service, 853 F.2d 5 (1st Cir. 1988), is also on point. It reiterates the test this Court should apply. Diaz broadly defines the term "relationship" and places the burden of showing there is no rational relationship on the applicant. The applicant must shoulder the burden of showing there is no rational relation between the regulation and any legitimate governmental objective. If the applicant cannot make such a showing, her challenge fails. Again, the burden is not on the governmental authority to establish a genuine public need for the specific regulation but rather on the applicant. See also Kelley v. Johnson, supra.

In the case sub judice, the applicant has failed to carry her burden and demonstrate the absence of a rational connection between the regulation and the job. The evidence presented reflects that the objective sought by the governmental body and the method utilized are proper.

The last question relating to the substantive due process issue is whether the ends of the regulation address a legitimate governmental interest.

The item sought to be regulated herein, employment and the use of tobacco products by potential hirees, is directed to the express desire by the City Manager to reduce insurance costs to the City and ultimately to its citizens through taxes. This Court finds that the

interest addressed by the City Manager is a legitimate governmental interest. See Bowman v. Township of Pennsauken, 709 F.Supp. 1329 (D.N.J. 1989).

Based on the foregoing, this Court concludes that the policy adopted by the North Miami City Manager does not violate a job applicant's substantive due process rights.

II.

Does the City's Policy Against Hiring Tobacco Users Violate a Job Applicant's Procedural Due Process Rights as Prescribed by the United States Constitution?

In order to determine whether procedural due process requirements apply, the Court must look first to the nature of the interest at stake. It must then look to see if that interest is within the Fourteenth Amendment's protection of liberty and property. Board of Regents of State College v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972).

To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have a legitimate claim of entitlement to it. Board of Regents, supra. In the instant case there is o statutorily created entitlement but merely a desire for employment. Accordingly, no property right is affected.

We must next decide if there is a liberty due process right to be considered for a particular job. The simple fact that certain procedures are made applicable does not, in and of itself, mean that these procedures acquire constitutional dimension. Slotnick v. Staviskey, 560 F.2d 31 (1st Cir. 1977). If the procedures take on a substantive character, constitutional guarantees may attach. If the procedures merely regulate the employment but do not permanently deprive someone of same, no liberty interest is involved and procedural due process rights are not affected. Cf. Vruno v. Schwarzwalder, 600 F.2d 124 (8th Cir. 1979).

Plaintiff relies on the cases of Fewquay v. Page, 682 F.Supp. 1195 (S.D. Fla. 1987), and Andrews v. Drew Municipal Separate School District, 507 F.2d 611 (5th Cir. 1975) to support the position that her

procedural due process rights have been violated. The distinction between Fewquay and Andrews and the instant case is clear. The individuals in those cases were permanently deprived of a right to employment due to conditions they could never overcome. In the case sub judice, Plaintiff has the absolute ability to control the condition that makes her ineligible for employment. The procedures in the instant case merely regulate and do not permanently deprive Plaintiff of the ability to be employed. Therefore, this Court concludes that since no property or liberty interest is involved, Plaintiff's procedural due process rights have not been affected.

III.
Are Plaintiff's Equal Protection Rights
Violated Under Either the United States
Or Florida Constitutions?

Plaintiff argues that the City's "tobacco-in-hiring" policy creates two distinct classes thereby violating the equal protection provisions of both the United States and Florida Constitutions. Plaintiff's position is without merit.

The equal protection clause of the Fourteenth Amendment does not require that a state choose between attacking every aspect of a problem or not attacking the problem at all. It is enough that the state's action be rationally based and free from invidious discrimination. Dandridge v. Williams, 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970).

In State v. Peters, 534 So.2d 760 (Fla. 3rd D.C.A. 1988), a case involving a pit bull ordinance, an argument was made that all dog owners were not being treated equally in violation of constitutional guarantees. It is well established that a law is not constitutionally defective simply because it contains classifications which are underinclusive. A governmental entity is not bound to deal alike with all classes or to strike at all evils at the same time or in the same manner. Dandridge, supra.

Since the City's policy only regulates applicants for employment as it concerns their use of tobacco products, plaintiff would be hard pressed to contend the class is overinclusive. She may contend it is underinclusive; however, her argument that such a class violates equal

protection is erroneous. Plaintiff's equal protection rights have not been violated. The City's stated rationale for treating tobacco users differently is valid.

IV.
Does Article I Section 23 of the Florida Constitution - Right to Privacy - Apply to the Instant Case?

Every natural person has the right to be let alone and free from governmental intrusion into his private life. This constitutional provision guaranteeing one's right to privacy was not intended to provide an absolute guarantee against all governmental intrusion into the private lives of individuals. Fla. Bd. of Bar Examiners Re: Applicant, 443 So.2d 71 (Fla. 1983); Stall v. State, 570 So.2d 257 (Fla. 1990).

The right to privacy is a fundamental right - one which demands application of a compelling state interest standard. This test places the burden on the state to justify any intrusion on privacy. This burden can be met by demonstrating that the challenged provision serves a compelling state interest and accomplishes its goal through the use of the least intrusive means. Winfield v. Division of Pari-Mutuel Wagering, 477 So.2d 544 (Fla. 1985). However, before the right to privacy attaches and the compelling state interest test need be applied, there must be a reasonable expectation of privacy. State v. Long, 544 So.2d 219 (Fla. 2nd D.C.A. 1989); Shaktman v. State, 553 So.2d 148 (Fla. 1989).

Plaintiff's analysis of this issue frames a question very narrow in scope. She argues she has a right to smoke in her own home. This Court agrees. So long as she does not smoke marijuana or any other illegal substance, she does. Laird, supra.

The issue presented by Plaintiff, however, is not the one that must be addressed. The question is whether a governmental entity may regulate employment. This question is not answered by resort to one's right to privacy. There is not expectation of privacy in employment. Accordingly, this Court rejects Plaintiff's reliance on Article I, Section 23 of the Florida Constitution.

V.

Does the Florida Clean Indoor Air Act Preempt Municipalities From Enacting Rules Encompassing Smoking?

While the Florida Clean Indoor Air Act regulates smoking and preempts this area to the state, the regulation as adopted by the City does not interfere with this Act. This Court, after analysis, concludes that the Clean Indoor Air Act is inapplicable to the instant case.

VI.

The Court has reviewed the rest of the issues raised by the parties and concludes that none need be specifically addressed. With due respect to both parties, no merit exists with these issues.

Conclusion

Based on the foregoing analysis of the issues presented, this Court concludes that the regulation adopted by the North Miami City Manager was a proper regulation adopted for a valid purpose. The regulation does not violate any provision of either the United States or Florida Constitutions.

No issue of material fact remains to be decided. The facts and law convince this Court that Defendant's Motion for Summary Judgment should be granted and the Plaintiff's Motion for Summary Judgment should be denied. Accordingly, Final Summary Judgment be and the same is hereby entered in favor of Defendant and against the Plaintiff.

The Court retains jurisdiction of this matter to consider the issue of costs.

DONE AND ORDERED in Chambers at Miami, Dade County, Florida this 21st day of August, 1992.

/S/
SIDNEY B. SHAPIRO
CIRCUIT COURT JUDGE

OPINION OF THE FLORIDA SUPREME COURT

SUPREME COURT OF FLORIDA

No. 82,836

THE CITY OF NORTH MIAMI,

Petitioner,

vs.

ARLENE KURTZ,

Respondent.

_____/

April 20, 1995

OVERTON, J.

We have for review Kurtz v. City of North Miami, 625 So.2d 899 (Fla. 3d DCA 1993). After the district court issued that decision, it certified, in a separate order, the following question as one of great public importance: DOES ARTICLE I, SECTION 23 OF THE FLORIDA CONSTITUTION PROHIBIT A MUNICIPALITY FROM REQUIRING JOB APPLICANTS TO REFRAIN FROM USING TOBACCO OR TOBACCO PRODUCTS FOR ONE YEAR BEFORE APPLYING FOR, AND AS A CONDITION FOR BEING CONSIDERED FOR EMPLOYMENT, EVEN WHERE THE USE OF TOBACCO IS NOT RELATED TO JOB FUNCTION IN THE POSITION SOUGHT BY THE APPLICANT? This question involves the issue of whether applicants seeking government employment have a reasonable expectation of privacy under article I, section 23, as to their smoking habits.[1] We have jurisdiction. Art. I, s 3(b)(4), Fla.

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1 Notably, because Florida's constitutional privacy provision applies only to government action, the provision would not be implicated if a job applicant was applying for a position with a private employer.

Const. For the reasons expressed, we answer the certified question in the negative, finding that Florida's constitutional privacy provision does not afford Arlene Kurtz, the job applicant in this case, protection under the circumstances presented.

The record establishes the following unrefuted facts. To reduce costs and to increase productivity, the City of North Miami adopted an employment policy designed to reduce the number of employees who smoke tobacco. In accordance with that policy decision, the City issued Administrative Regulation 1-46, which requires all job applicants to sign an affidavit stating that they have not used tobacco or tobacco products for at least one year immediately preceding their application for employment. The intent of the regulation is to gradually reduce the number of smokers in the City's work force by means of natural attrition. Consequently, the regulation only applies to job applicants and does not affect current employees. Once an applicant has been hired, the applicant is free to start or resume smoking at any time. Evidence in the record, however, reflects that a high percentage of smokers who have adhered to the one year cessation requirement are unlikely to resume smoking.

Additional evidence submitted by the City indicates that each smoking employee costs the City as much as $4,611 per year in 1981 dollars over what it incurs for non-smoking employees. The City is a self-insurer and its taxpayers pay for 100% of its employees' medical expenses. In enacting the regulation, the City made a policy decision to reduce costs and increase productivity by eventually eliminating a substantial number of smokers from its work force. Evidence presented to the trial court indicated that the regulation would accomplish these goals.

The respondent in this case, Arlene Kurtz, applied for a clerk-typist position with the City. When she was interviewed for the position, she was informed of Regulation 1-46. She told the interviewer that she was a smoker and could not truthfully sign an affidavit to comply with the regulation. The interviewer then informed Kurtz that she would not be considered for employment until she was smoke-free for one year. Thereafter, Kurtz filed this action seeking to enjoin enforcement of the regulation and asking for a declaratory judgment finding the regulation to be unconstitutional.

In ruling on a motion for summary judgment, the trial judge recognized that Kurtz has a fundamental right of privacy under article I, section 23, of the Florida Constitution. The trial judge noted that Kurtz had presented the issue in the narrow context of whether she has a right to smoke in her own home. While he agreed that such a right existed, he concluded that the true issue to be decided was whether the City, as a governmental entity, could regulate smoking through employment. Because he found that there is no expectation of privacy in employment and that the regulation did not violate any provision of either the Florida or the federal constitutions, summary judgment was granted in favor of the City.

The Third District Court of Appeal reversed. The district court first determined that Kurtz' privacy rights are involved when the City requires her to refrain from smoking for a year prior to being considered to employment. The district court then found that, although the City does have an interest in saving taxpayers money by decreasing insurance costs and increasing productivity, such interest is insufficient to outweigh the intrusion into Kurtz' right of privacy and has no relevance to the performance of the duties involved with a clerk-typist. Consequently, the district court concluded that the regulation violated Kurtz's privacy rights under article I, section 23, of the Florida Constitution. We disagree.

Florida's constitutional privacy provision, which is contained in article I, section 23, provides as follows: Right of privacy.--Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law. This right to privacy protects Florida's citizens from the government's uninvited observation of or interference in those areas that fall within the ambit of the zone of privacy afforded under this provision. Shaktman v. State, 553 So.2d 148 (Fla.1989). Unlike the implicit privacy right of the federal constitution, Florida's privacy provision is, in and of itself, a fundamental one that, once implicated, demands evaluation under a compelling state interest standard. Winfield v. Division of Pari-Mutuel Wagering, 477 So.2d 544 (Fla.1985). The federal privacy provision, on the other hand, extends only to such fundamental interests as marriage, procreation, contraception, family relationships, and the rearing and educating of children. Carey v. Population Serv. Int'l, 431 U.S. 678, 97

Although Florida's privacy right provides greater protection than the federal constitution, it was not intended to be a guarantee against all intrusion into the life of an individual. Florida Bd. of Bar Examiners re Applicant, 443 So.2d 71 (Fla.1983). First, the privacy provision applies only to government action, and the right provided under that provision is circumscribed and limited by the circumstances in which it is asserted. Id. Further, "[d]etermining 'whether an individual has a legitimate expectation of privacy in any given case must be made by considering all the circumstances, especially objective manifestations of that expectation.' " Stall v. State, 570 So.2d 257, 260 (Fla.1990) (alteration in original) (quoting Shaktman, 553 So.2d at 153 (Fla.1989) (Ehrlich, C.J., concurring)), cert. denied, 501 U.S. 1250, 111 S.Ct. 2888, 115 L.Ed.2d 1054 (1991). Thus, to determine whether Kurtz, as a job applicant, is entitled to protection under article I, section 23, we must first determine whether a governmental entity is intruding into an aspect of Kurtz's life in which she as a "legitimate expectation of privacy." If we find in the affirmative, we must then look to whether a compelling interest exists to justify that intrusion and, if so, whether the least intrusive means is being used to accomplish the goal.

In this case, we find that the City's action does not intrude into an aspect of Kurtz' life in which she has a legitimate expectation of privacy. In today's society, smokers are constantly required to reveal whether they smoke. When individuals are seated in a restaurant, they are asked whether they want a table in a smoking or non-smoking section. When individuals rent hotel or motel rooms, they are asked if they smoke so that management may ensure that certain rooms remain free from the smell of smoke odors. Likewise, when individuals rent cars, they are asked if they smoke so that rental agencies can make proper accommodations to maintain vehicles for non-smokers. Further, employers generally provide smoke-free areas for non-smokers, and employees are often prohibited from smoking in certain areas. Given that individuals must reveal whether they smoke in almost every aspect of life in today's society, we conclude that individuals have no reasonable expectation of privacy in the disclosure of that information when applying for a government job and, consequently, that Florida's right of privacy is not implicated under these unique circumstances.

In reaching the conclusion that the right to privacy is not implicated in this case, however, we emphasize that our holding is limited to the narrow issue presented. Notably, we are not addressing the issue of whether an applicant, once hired, could be compelled by a government agency to stop smoking. Equally as important, neither are we holding today that a governmental entity can ask any type of information it chooses of prospective job applicants.

Having determined that Kurtz has no legitimate expectation of privacy in revealing that she is a smoker under the Florida constitution, we turn now to her claim that the regulation violates her rights under the federal constitution. As noted, the federal constitution's implicit privacy provision extends only to such fundamental interests as marriage, procreation, contraception, family relationships, and the rearing and educating of children. Carey. Clearly, the "right to smoke" is not included within the penumbra of fundamental rights protected under that provision. Grusendorf v. City of Oklahoma City, 816 F.2d 539 (10th Cir.1987) (the act of smoking a cigarette does not rise to the level of a fundamental right). Moreover, even if we were to find that some protected interest under the federal constitution were implicated so as to require a rational basis for the regulation we would still find the regulation to be constitutional. Kelley v. Johnson, 425 U.S. 238, 96 S.Ct. 1440, 47 L.Ed.2d 708 (1976) (when assuming a liberty interest exists in an employment regulation, regulation must be reviewed under a rational basis test). As acknowledged by the district court, the City has a legitimate interest in attempting to reduce health insurance costs and to increase productivity. On these facts, the City's policy cannot be deemed so irrational that it may be branded arbitrary. Kelley. In fact, under the special circumstances supported by the record in this case, we would find that the City has established a compelling interest to support implementation of the regulation. As previously indicated, the record reflects that each smoking employee costs the City as much as $4,611 per year in 1981 dollars over what it incurs for non-smoking employees; that, of smokers who have adhered to the one year cessation requirement, a high percentage are unlikely to resume smoking; and that the City is a self-insurer who pays 100% of its employees' medical expenses. We find that the elimination of these costs, when considered in combination with the other special circumstances of this case, validates a compelling interest in the City's policy of gradually eliminating smokers from its work force. We also find that the City is using the least intrusive means in accomplishing this compelling interest

because the regulation does not prevent current employees from smoking, it does not affect the present health care benefits of employees, and it gradually reduces the number of smokers through attrition. Thus, we find the regulation to be constitutional under both the federal and Florida constitutions.

For the reasons expressed, we answer the question in the negative, finding that Florida's constitutional privacy provision does not afford the applicant, Arlene Kurtz, protection because she has no reasonable expectation of privacy under the circumstances of this case. Accordingly, we quash the district court's decision, and we remand this case with directions that the district court of appeal affirm the trial court judgment.

It is so ordered.

GRIMES, C.J., and HARDING, WELLS and ANSTEAD, JJ., concur.

KOGAN, J., dissents with an opinion, in which SHAW, J., concurs.

KOGAN, Justice, dissenting.

As the majority itself notes, job applicants are free to return to tobacco use once hired. I believe this concession reveals the anti-smoking policy to be rather more of a speculative pretense than a rational governmental policy. Therefore I would find it unconstitutional under the right of due process. See Department of Law Enforcement v. Real Property, 588 So.2d 957 (Fla.1991).

The privacy issue is more troublesome, to my mind. There is a "slippery- slope" problem here because, if governmental employers can inquire too extensively into off-job-site behavior, a point eventually will be reached at which the right of privacy under article I, section 23 clearly will be breached. An obvious example would be an inquiry into the lawful sexual behavior of job applicants in an effort to identify those with the "most desirable" lifestyles. Such an effort easily could become the pretext for a constitutional violation. The time has not yet fully passed, for example, when women job applicants have been questioned about their plans for procreation in an effort to eliminate those who

may be absent on family leave. I cannot conceive that such an act is anything other than a violation of the right of privacy when done by a governmental unit.

Health-based concerns like those expressed by the City also present a definite slippery slope to the courts. The time is fast approaching, for example, when human beings can be genetically tested so thoroughly that susceptibility to particular diseases can be identified years in advance. To my mind, any governmental effort to identify those who might eventually suffer from cancer or heart disease, for instance, itself is a violation of bodily integrity guaranteed by article I, section 23. Moreover, I cannot help but note that any such effort comes perilously close to the discredited practice of eugenics.

The use of tobacco products is more troubling, however. While legal, tobacco use nevertheless is an activity increasingly regulated by the law. If the federal government, for instance, chose to regulate tobacco as a controlled substance, I have no trouble saying that this act alone does not undermine anyone's privacy right. However, regulation is not the issue here because tobacco use today remains legal. The sole question is whether the government may inquire into off-job-site behavior that is legal, however unhealthy it might be. In light of the inherently poor fit between the governmental objective and the ends actually achieved, I am more inclined to agree with the district court that the right of privacy has been violated here. I might reach a different result if the objective were better served by the means chosen.

SHAW, J., concurs.

ORDER DENYING MOTION FOR REHEARING

SUPREME COURT OF FLORIDA

Wednesday, July 5, 1995

CASE NO. 82,836

THE CITY OF NORTH MIAMI, FLORIDA,

Petitioner,

v.

ARLENE KURTZ,

Respondent.

_____/

Respondent's Motion for Rehearing filed in the above cause is hereby denied.

GRIMES, C.J., OVERTON, HARDING, WELLS and ANSTEAD, JJ., concur
SHAW and KOGAN, JJ., dissent

Sid J. White
Clerk, Supreme Court